INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	8
Conclusion	11

CITATIONS

Cases:

Bradley v. *Fisher*, 13 Wall. 335	9, 10
Burr, Ex Parte, 9 Wheat. 529	9, 10
Chopak, In re, 160 F. 2d 886	10
Claiborne, In re, 119 F. 2d 647	10
Cobb v. *United States*, 172 Fed. 641	9
Sacher v. *Association of the Bar*, 347 U.S. 388	11
Sawyer, In re, 360 U.S. 622	10
Schachne, In re, 87 F. 2d 887	10
Scouten, In re, 186 Pa. 270, 40 Atl. 481	9
Spicer, In re, 126 F. 2d 288	10
Theard v. *United States*, 354 U.S. 278	9

Rule:

F. R. Civ. P., Rule 52(a)	10

622113 – 61 —— 1

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 558

MAYO S. LEVENSON, PETITIONER

v.

PETER MILLS, UNITED STATES ATTORNEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The "Findings, Opinion and Order" of the district court (R. 299–325)[1] are not reported. The opinion of the court of appeals (Pet. App. 31–35) is reported at 294 F. 2d 397.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1961 (Pet. App. 35). The petition for certiorari was filed on November 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

[1] "R." refers to the Record Appendix to Brief for Appellant in the court below and was filed in this Court under Rule 21(1).

QUESTION PRESENTED

Whether the court below properly found that there was adequate evidentiary support in the record to substantiate the order of the United States District Court for the District of Maine disbarring petitioner from further practice before that court on the ground that he had improperly attempted to influence proceedings before a Referee in Bankruptcy and had personally castigated the Referee.

STATEMENT

This is a disbarment proceeding, initiated by respondent United States Attorney at the request of the United States District Court for the District of Maine, to suspend petitioner, Mayo Levenson, a member of the Maine bar, from practice in that court. The charges against petitioner were contained in a certificate filed with the court by Richard E. Poulos, the Referee in Bankruptcy (R. 5–14).

Petitioner is a 57-year-old attorney, admitted in both state and federal courts of Maine, and has practiced law in Portland, Maine, for 35 years (R. 138). He is the senior member of Levenson, Bennett & Schwarz, a firm consisting of petitioner, Herbert Bennett, a key witness in this action, and Robert Schwarz (R. 141). Richard Poulos, the Referee in Bankruptcy, is 37 years old and likewise a member of the Maine state and federal courts (R. 69–70). He has been practicing law in Maine since his graduation from law school in 1951, serving five years as clerk to the late John D. Clifford, formerly United States District Judge for Maine. In 1956,

he was appointed by Judge Clifford as Referee in Bankruptcy for a term of five years and has continued to serve in that capacity (R. 69). He and petitioner were acquainted prior to the actions which gave rise to these proceedings (R. 24).

1. *The initiation of bankruptcy proceedings.*—On September 7, 1960, an involuntary petition in bankruptcy was filed by three creditors against the Twin Town Chevrolet Co., Inc., a corporation of the State of Maine (R. 22). Twin Town consented to be adjudicated a bankrupt and disclosed debts of $300,000 and assets slightly less than $150,000 (R. 6). Among these debts was a chattel mortgage on stocks and fixtures to one Ernest Shapiro, and to William Clifford, an attorney and brother of the late Judge Clifford (R. 206). At the first meeting of creditors, before the Referee in Bankruptcy on October 3, 1960, Myer M. Marcus, a local attorney with some 23 years experience, was elected as trustee in bankruptcy (R. 23, 75). John J. Flaherty was informally designated attorney for the trustee by the Referee on October 3, and was formally appointed on October 16, 1960 (R. 26).

2. *The Levenson-Poulos conversation on October 10, 1960.*—On October 10, 1960, petitioner came to the Referee's office to inquire about the Clifford mortgage (R. 24, 172–173). The Referee testified that petitioner began the conversation by stating (R. 24):

> Listen, Poulos, I represent Bill Clifford who has a $10,000 mortgage on this Twin Town Bankruptcy Matter. Now, Bill Clifford is one helluva guy, and I am not charging him a

> dime, and I want to know just exactly how you are going to protect his claim.

The Referee replied that, although Clifford was his personal friend, the case would not be handled differently from any other proceeding, and Clifford would get a fair, impartial, and correct decision (R. 24). Petitioner retorted (R. 25):

> And you know, Poulos, that you are sitting in that seat now because of Judge Clifford who appointed you to that position.

Before he left, petitioner informed the Referee that Herbert Bennett would handle the mortgage (R. 27).

Disturbed by this conversation, the Referee telephoned Flaherty as soon as petitioner left the office to inform him to exercise care in conducting the affairs of the estate and reviewing the Clifford mortgage (R. 25–26). Flaherty testified that he did receive such a warning from the Referee (R. 107).

Petitioner admits the substance of much of the above conversation, and acknowledges that William Clifford's relationship to the Judge who appointed the Referee in Bankruptcy was discussed, but attributes such statement to the Referee. He testified that his own words were (R. 173):

> Well, here, this is Bill Clifford, and you know Bill Clifford, and I don't know anything about the mortgage, but by jiminy I don't think Bill Clifford would have anything to do with anything that was reprehensible * * *.

The Referee allegedly retorted (R. 173–174): "You are trying to say to me that Bill Clifford is the brother of the Judge that appointed me, so what?" To which

petitioner replied (R. 174): "So the devil with you. I haven't asked you for anything."

3. *The December 19 hearing.*—On December 19, 1960, in response to Bennett's petition, a hearing was held to determine the validity of the Clifford mortgage (R. 28). Bennett appeared on behalf of the mortgagees. It developed at this session and at subsequent meetings that there were considerable controversy and serious legal objections concerning the validity of the mortgage (R. 40). The matter was not resolved and the hearing was continued until December 29, 1960 (R. 42).

4. *The Levenson-Marcus conversation of December 20, 1960.*—Marcus, the trustee in bankruptcy, testified that he received a telephone call about 9:30–10:00 a.m. on December 20 from petitioner (R. 77), who stated that he knew that the Referee had advised Marcus' attorney (Flaherty) to be rough about the mortgage, and added (R. 78), "Mr. Poulos can't continue to give ligitimate [*sic*] businessmen a rough time. He treated Mr. Clifford like a criminal and made it appear that Mr. Clifford's mortgage was a fraudulent mortgage." Marcus replied that, if petitioner were unhappy, he could seek a review of the Referee's rulings in the district court (R. 78–79).

Petitioner continued to inveigh against the Referee, stating that he was humiliating lawyers, and that he (petitioner) would join with others to seek the Referee's removal. Petitioner remarked that Poulos was getting "too big for his britches," and announced that the petitioner would campaign against his reappointment (R. 79). Petitioner admits this conversation

took place, but denies that the Referee was mentioned (R. 177).

At the conclusion of this conversation, Marcus went immediately to the bankruptcy court and spoke to Gerald Cope, the Referee's law clerk (R. 80). Marcus testified that he informed Cope what had occurred (R. 292). Over petitioner's objections, Cope testified that Marcus had so informed him at that time (R. 289). Marcus examined the transcript of the December 19 hearing, and arranged for a meeting with the Referee and Bennett in the Referee's office. After hearing Marcus' remarks, the Referee stated that he knew petitioner was angry with him, but that he was the one who had the grounds to be angry at petitioner and Bennett because of the improper advance made by petitioner on October 10 (R. 41, 221). Bennett reported the substance of the conversation to the petitioner about 3:00 that afternoon (R. 177, 221).

5. *The Levenson-Poulos conversation of December 20.*—Petitioner, upon hearing Bennett's report on the morning's activities, placed an immediate call to the Referee (R. 42–43, 177–178). The Referee testified that, in this conversation, petitioner said to the Referee (R. 42–43):

> Why, you Bastard. I never asked you to do anything wrong * * *. Poulos you are now in trouble. I have always considered you as one of my friends. I touted you as the finest Referee in Bankruptcy Maine has ever had. I have protected you against very influential people, because of your tough decisions on secured creditors; that you had no damn business for sticking your nose into this Clifford matter;

> that you're ungrateful because you are sitting in that position only because of the late Judge Clifford, and if Clifford loses this case, you're going to pay for it and pay for it dearly * * *. A lot of people are angry at the way you're handling that bankruptcy court. You're nothing but a monster. You're always going into these mortgages, and we're going to organize a vicious campaign against you with the leading law firms, the Portland banks, and we are going to exert pressure on Gignoux so that you will not be reappointed, and, Buster, don't worry about being stabbed in the back; you're going to get it head-on and I mean hard.

Shortly afterward the Referee received a call from Bennett, who stated that petitioner had "really lost his head" and "went into a rage" (R. 43, 222, 228).

Petitioner acknowledged that he was extremely angry. He denied using profanity but admitted using the following phrase: "From now on I am your enemy and I will tell you something. I will oppose your reappointment with all the force that I can gather" (R. 179–183). He admitted on the stand that this was not proper conduct for a lawyer while speaking to a judge (R. 179, 186–187), but sought mitigation in that he was extremely angry about what he thought was extreme injustice to him (R. 179).

6. *The second Levenson-Marcus conversation of December 21, 1960.*—There was a meeting of Marcus, Bennett, Flaherty and the Referee on December 21, at which the Clifford mortgage was discussed (R. 44, 117–119). Following that meeting petitioner again called Marcus on the telephone. According to

Marcus, petitioner made such statements as (R. 88, 92–93): "Now this is a fight between Poulos and myself * * *. He can't push the Clifford office around * * *. He is now tangling with the banks, and they do not like it * * *. Poulos is a monster."

7. *Initiation of the present disbarment proceedings.*—The Referee, disturbed by petitioner's conduct, felt unable to render a fair verdict on the Clifford mortgage. He filed a certificate on December 27, 1960, stating that he wished to be removed from the case and requesting that the court adjudge petitioner guilty of civil contempt or, in the alternative, disbar him (R. 6–14). An order to show cause, was issued on December 29, 1960 (R. 14–15), which petitioner answered in a plea dated January 3, 1961 (R. 15–18). With the consent of both parties, the disbarment and contempt proceedings were tried together (R. 20). After three days of hearings, the court ordered petitioner disbarred from the practice of law in the United States District Court for the District of Maine (R. 324).

In the findings and opinion that accompanied the order, the court noted its acceptance of the testimony of the Referee and Marcus rather than that of petitioner. The contempt proceedings were dismissed (R. 324–325). On appeal by petitioner, the court of appeals affirmed (Pet. App. 31–35).

ARGUMENT

Although petitioner seeks review in this Court of proceedings which have resulted in his disbarment, he is unable to point to any irregularities in the trial

court's proceedings or to show that, in affirming the trial court's disbarment order on the basis of the evidence in the record, the court below employed an incorrect standard of review. Further consideration by this Court, accordingly, is not warranted.

1. Any interference by attorneys with the orderly administration of the office of a Referee in Bankruptcy seriously impairs the ability and efficiency of a district court. The court therefore has the power and the duty to disbar attorneys when necessary in order to uphold the high standards of honor and respect to which a Referee in Bankruptcy is entitled. Cf. *Ex Parte Burr*, 9 Wheat. 529; *Bradley* v. *Fisher*, 13 Wall. 335; *Theard* v. *United States*, 354 U.S. 278; *Cobb* v. *United States*, 172 Fed. 641 (C.A. 9); *In re Scouten*, 186 Pa. 270, 40 Atl. 481. The power to disbar is particularly significant in Maine, which is one of the busiest bankruptcy jurisdictions in New England, with 50 to 75 attorneys constantly working as trustees, or as attorneys for trustees under one Referee, a man who devotes some 70 or 80 hours per week to his work (R. 71–72).

2. In the present case, there was abundant evidentiary support for the trial court's disbarment order. In particular, petitioner's visit to the Referee's office on October 10 (*supra*, pp. 3–5) and the phone call between them on December 20 (*supra*, pp. 6–7) well deserve the lower court's appellation of "reprehensible" (R. 322). The record overwhelmingly demonstrates that petitioner, while engaged in litigation before a judicial officer, castigated that officer in regard to matters directly involved in that

litigation, and thereby forced the Referee to request his own removal. Indeed, petitioner conceded that he called the Referee his enemy and promised to see to it that he was not reappointed (*supra*, p. 7) Compare *Bradley* v. *Fisher*, 13 Wall. 335, 356, which involved an attorney's threat to personally chastise a judge.

3. The court of appeals applied the appropriate and long-established standard of review in reviewing the trial court's disbarment order. See *Ex Parte Burr*, 9 Wheat. 529; *In re Sawyer*, 360 U.S. 622, 629; *In re Chopak*, 180 F. 2d 886 (C.A. 2); *In re Schachne*, 87 F. 2d 887 (C.A. 2); *In re Spicer*, 126 F. 2d 288 (C.A. 6); *In re Claiborne*, 119 F. 2d 647 (C.A. 1). The court's opinion makes it plain that, in assessing the trial court's factual finding against the "clearly erroneous" test prescribed by Rule 52(a), F.R. Civ. P. (Pet. App. 33), it was constrained by the abundant evidentiary support disclosed by the record to affirm the trial court's findings.

Moreover, even if the "clear and convincing evidence" test would have been appropriate in the present case, petitioner cannot show that application of that test would have led the court of appeals to reverse the order of disbarment. Under any test the trial court properly accepted the testimony of the Referee, Marcus, and, in many instances, of Bennett, petitioner's partner, as opposed to the sole and uncorroborated testimony of an attorney whose own admissions as to his conduct tended to discredit him.

4. Petitioner's final contention is that the penalty of disbarment is too severe and that mitigating circumstances should have been considered. The district court, however, took such factors into consideration. Moreover, as the court of appeals noted in its opinion (PT. App. 35), the disbarment order while "permanent in form * * * is not irrevocable," and petitioner may be reinstated on proof of "a sincere and timely change of attitude." Accord, *Sacher* v. *Association of the Bar*, 347 U.S. 388, 393, n. 5.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
MORTON HOLLANDER,
JAMES C. CAWOOD, JR.,
Attorneys.

DECEMBER 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961